No. 16-1454

IN THE

Supreme Court of the United States

STATE OF OHIO, *et al.*,

Petitioners,

—v.—

AMERICAN EXPRESS COMPANY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR *AMICI CURIAE* PROF. DAVID S. EVANS AND PROF. RICHARD SCHMALENSEE IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Professors David S. Evans and Richard Schmalensee are economists who, individually and as co-authors, have published extensively on the economics of two-sided platform businesses and the application of antitrust analysis to them. Five of their publications on two-sided platforms, and the analysis of market definition for such enterprises, were cited in a total of seventeen references by the Second Circuit[2] and two of their publications were cited in a total of eight references by the District Court in the matter before the Court.[3] They submit this Amicus Brief to provide background and analysis that could assist the Court in applying the rule of reason to platform enterprises and to point out the serious risks of employing a rigid analytical framework for the antitrust analysis of diverse platforms, conduct, and fact patterns.

Evans and Schmalensee have been commissioned to write surveys concerning the antitrust economics of two-sided platforms for the American Bar Association (ABA) Antitrust Section's handbook, *Issues in Competition Law and Policy*, and for the

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1 No counsel for a party authored this brief in whole or in part, and no party or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici* and their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

2 *See* Pet. App. 7a, 8a, 10a-12a, 16a-18a.

3 *See id.* at 77a-79a, 122a, 131a, 182a n.36.

Oxford University Press, *Oxford Handbook of International Antitrust Economics*. They were also commissioned to write the entry on the general economics of two-sided platforms for the New Palgrave Dictionary of Economics. Their book, *Matchmakers: The New Economics of Multisided Platforms*, which provides a non-technical introduction to this area, won the 2017 Axiom Business Book Awards Gold Medal in Economics. It has been, or is in the process of being, translated into Chinese, French, Korean, Japanese, Russian, Spanish, and Vietnamese.

Professor David S. Evans is Chairman of Global Economics Group, based in Boston. He has been, since 2004, Visiting Professor at University College London where he is Co-Director of the Jevons Institute for Competition Law and Economics. He has also taught antitrust economics at the University of Chicago Law School (2006-2016) and antitrust economics and law and economics at Fordham Law School (1985-1995). He has authored or co-authored a number of articles on economic methods for defining markets and analyzing conduct involving two-sided platforms, as well as other topics in antitrust economics. He has been commissioned to write surveys on multisided platforms by the Antitrust Section of the ABA for its handbook *Market Definition in Antitrust: Theory and Case Studies* and by the Competition Committee of the Organisation for Economic Co-operation and Development (OECD) for its Policy Roundtable on Two-Sided Markets. He has worked, and is currently working, as an expert economist on antitrust matters involving platforms on behalf of defendants, plaintiffs, and competition authorities in the U.S.

and abroad. He has a Ph.D. in Economics from the University of Chicago.

Professor Richard Schmalensee is Dean Emeritus and Howard W. Johnson Professor of Management Emeritus at the Massachusetts Institute of Technology (MIT) Sloan School of Management and Professor of Economics Emeritus at the MIT Department of Economics. He is a Fellow of the Econometric Society and the American Academy of Arts and Sciences and has served as a Member of the President's Council of Economic Advisers and of the Executive Committee of the American Economic Association. He was the 2012 Distinguished Fellow of the Industrial Organization Society. He has authored or co-authored a number of articles on two-sided platforms and antitrust economics as well as numerous highly cited articles in industrial organization economics. He has worked as an expert economist on behalf of defendants, plaintiffs, and competition authorities on a wide variety of matters, some of which have involved platform enterprises. He has a Ph.D. in Economics from MIT.

SUMMARY OF ARGUMENT

The Court's analysis of competitive effects, which generally includes market definition as a critical step, has been guided properly by sensitivity to business reality and sound economic analysis of the conduct at issue. When it comes to two-sided platforms the Court should adhere to that same flexible but principled approach and avoid rigid alternatives that would apply regardless of the platform, conduct, or fact-pattern.

In the matter before the Court, the U.S. Department of Justice, as well as the Petitioner *Amici* Law Professors[4] and Petitioner *Amici* Economists[5] have proposed analytical frameworks that would, first, require courts to restrict the relevant antitrust market to the side of the platform that is the subject of the challenged conduct[6] and, second, to then exclude the impact of the conduct on the other side of the platform for the purposes of establishing anticompetitive effects under the first stage of the rule of reason inquiry.[7] This proposed analytical framework would apparently apply to all platform enterprises, for all possible challenged conduct, and for all possible fact

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[4] The "Petitioner *Amici* Law Professors" refers to the brief filed by the 28 Professors of Antitrust Law as *Amici Curiae* Supporting Petitioners (Dec. 14, 2017).

[5] The "Petitioner *Amici* Economists" refers to the brief filed by *Amici Curiae* John M. Connor, Martin Gaynor, Daniel McFadden, Roger Noll, Jeffrey M. Perloff, Joseph A. Stiglitz, Lawrence J. White, and Ralph A. Winter in Support of Petitioners (Dec. 14, 2017).

[6] *See* U.S. Br. 35-40; Petitioner *Amici* Law Professors' Br. 17-20; Petitioner *Amici* Economists' Br. 30-31.

[7] *See* U.S. Br. 43-47; Petitioner *Amici* Law Professors' Br. 20-27; Petitioner *Amici* Economists' Br. 30-31. The Petitioner *Amici* Law Professors and Petitioner *Amici* Economists would further exclude consideration of procompetitive benefits on the other side of the platform in the second stage of the rule of reason inquiry. *See* Petitioner *Amici* Law Professors' Br. 32-34; Petitioner *Amici* Economists' Br. 23. We note that the Justice Department does not go to this extreme. It argues that the courts should consider procompetitive benefits on the other side of the platform in the second stage of the rule of reason analysis. U.S. Br. 52.

patterns. Given that these platform enterprises are a large and growing portion of the economy, this framework would fundamentally transform the rule of reason.

Such a rigid approach could lead courts, and possibly require them, to ignore business reality, sound economics, and fact patterns in analyzing alleged anticompetitive conduct by platform enterprises and defining relevant antitrust markets. Following this approach could result in tribunals wrongly exonerating behavior that is anticompetitive (because, e.g., the harm to the other side is ignored) or wrongly condemning behavior that is not (because, e.g., the benefit to the other side is ignored).

The risk of error from ignoring customers on one side of a platform during the first stage of the rule of reason analysis is heightened for platforms that provide services that, by their very nature, are consumed jointly and unseverably by two different types of customers.[8] In these cases, the platform can charge either or both types of customers for the service that both consume jointly in order to recover the platform's costs and make a profit. A restaurant reservation service, for example, provides a valuable service only when it enables a person wishing to dine at a restaurant to make a reservation and a restaurant to take that reservation from that prospective

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[8] Examples include online marketplaces, stock exchanges, dating businesses, messaging platforms, and payment networks.

diner. The reservation service can charge the diner, the restaurant, or both for this service.

To determine whether a restraint is anticompetitive, where, as in the restaurant reservation example, the platform's matching services are joint and unseverable, the presumption at the first stage of the rule of reason should be to consider the impact on both sets of customers, on how much they jointly pay, and, ultimately, on the overall output of the jointly consumed service.[9] Conduct that increases the overall output of a service should be commended, not condemned, as that is a central virtue of competition.[10]

This is not a matter of burden shifting. There is simply no way to know, especially in the case of a platform that provides a service that customers on each side consume jointly, whether a practice is anticompetitive without at least considering both types of customers and the overall competition among platforms. That analysis must, therefore, happen at the first stage of the rule of reason to assess whether the conduct is anticompetitive or not.

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[9] As is always the case with the rule of reason, the inquiry ultimately concerns the impact of the conduct on the market price and output. *See, e.g.*, *NCAA* v. *Board of Regents*, 468 U.S. 85, 113 (1984) (calling higher prices and lower output "hallmarks of anticompetitive behavior").

[10] The *Amici* Economists want to discourage the courts from looking at the standard signals of competitive harm—price and output—because, despite received antitrust doctrine, they contend that lower prices and higher output may be undesirable. *See* Petitioner *Amici* Economists' Br. 12 n.15, 20, 34-35.

The assertion by the Petitioners and some of the *Amici* in support that the relevant antitrust market for a two-sided platform *always includes* the side of the platform on which the conduct has occurred and *always excludes* the other side of the platform conflicts with sound economics and is clearly wrong for platforms that provide services that are jointly consumed, and unseverable, by the customers on each side. In such cases there is a single service that is subject to competition, and it is that service that is interchangeable among the customers that use it. For example, while the benefits that diners and restaurants each obtain from an online reservation service are not reasonably interchangeable, the service they jointly consume *is* reasonably interchangeable with services provided by other online restaurant reservation services.

The U.S. Department of Justice, Petitioner *Amici* Law Professors, and Petitioner *Amici* Economists write as if they are asking the Court to conduct rule of reason business as usual. In fact, they are insisting that the courts *always* view *all* platform enterprises through a uniquely narrow and distorted lens. We urge the Court to reject this request and, instead, to take business reality and the facts on the ground into account in applying the rule of reason to two-sided platforms, as courts do in cases involving all enterprises. There will be matters—especially involving platforms that provide joint and unseverable matching services—in which, to minimize errors, the courts will need to consider both sides of a platform. There will also be some cases in which it may be pos-

sible to address certain issues by considering only one side of a platform.[11]

ARGUMENT

I. Two-Sided Platforms Are Enterprises For Which The Demands Between Different Types Of Customers, Connected By The Platform, Are Interdependent

Two-sided platforms enable two distinct types of participants to interact more readily and realize gains from trade or other interaction.[12] They provide each customer group with access to the other customer group. The key technical feature is that the demand for the platform service by each type of participant depends on the demand for the platform service by the other type of participant as a result of ex-

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[11] We agree with the Second Circuit's conclusion in *American Express* that the Plaintiffs failed to establish—taking both sides into consideration—that the challenged provisions resulted in anticompetitive effects because there was no evidence that the provisions resulted in an overall increase in price and, most importantly, an overall decrease in the output of transaction services. We do not believe, however, that the Court should mandate a mechanical application of the framework used by the Second Circuit in all cases involving two-sided platforms regardless of the business, competitive dynamics, conduct, or fact-patterns.

[12] Two-sided platforms are a special case of multisided platforms, which can serve two or more distinct groups of customers. We consider two-sided platforms here to simplify the discussion but the analysis applies to platforms with more than two sides.

ternalities between the two types of participants.[13] It is now generally recognized in industrial organization economics and business strategy that the interdependency of demand for the two customer groups can have significant economic ramifications.

The relevant literature, which started in 2000 with the circulation of a working paper version of Rochet and Tirole's seminal contribution, is now 17 years old, encompasses hundreds of published papers, several major books, and is a standard and noncontroversial part of the modern industrial organization literature.[14] The basic insights of the economic literature are now widely discussed in nontechnical books and media, have diffused widely through the business world, and are applied in business decisions.[15]

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[13] The Petitioner *Amici* Economists note that the fact that raising the price on one side of a platform decreases demand on the other side is similar at the level of abstract theory to the relation between prices and demands for complements, like tennis racquets and tennis balls. Petitioner *Amici* Economists' Br. 4-5. This neglects a fundamental difference in business reality between the two situations: a platform *must* serve both its sides, because it is in the business of connecting them, while many businesses sell one complement (tennis balls) but not the other complement (tennis racquets).

[14] *See United States Telecom Ass'n* v. *FCC*, 825 F.3d 674, 754 (D.C. Cir. 2016) (Williams, J., concurring in part, dissenting in part) (referring to "the vast scholarly treatment" of two-sided markets).

[15] For key theoretical contributions see Jean-Charles Rochet & Jean Tirole, *Platform Competition in Two-Sided Markets*, 1 J. Eur. Econ. Ass'n 990 (2003); Jean-Charles Rochet & Jean Tirole, *Two-Sided Markets: A Progress Report*, 37 RAND

Footnote continued on next page.

Potential platform participants often make two distinct decisions. They decide whether or not to join a platform so that they have the option to use it. In the case of a ride-sharing service, drivers have to sign on to drive for the service, and passengers need to install an app and set up an account. Having joined a platform, participants make decisions on how much to use it. Drivers have to decide how much to drive for a particular service. Passengers have to decide how many rides to take on that service.

A platform may set both access prices for joining the platform and transaction prices for using it for each set of participants. The economic theory of two-sided platforms shows that profit-maximizing access and transaction prices can be less than the marginal cost of provision, and can even be zero or negative, subject to at least some of these prices being suffi-

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J. Econ. 645 (2006); Mark Armstrong, *Competition in Two-Sided Markets*, 37 RAND J. Econ. 668 (2006); and E. Glen Weyl, *A Price Theory of Multi-Sided Platforms*, 100 Am. Econ. Rev. 1642 (2010). For nontechnical surveys, see Marc Rysman, *The Economics of Two-Sided Markets*, 23 J. Econ. Perspectives 125 (2009); David S. Evans & Richard Schmalensee, *The Antitrust Analysis of Multisided Platform Businesses*, in 1 Oxford Handbook Int'l Antitrust Econ. 404 (Roger D. Blair & D. Daniel Sokol eds., 2014). The online appendix to our Oxford Handbook paper lists over 350 significant economic articles published through December 2012; *see* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2185373. The Harvard Business Review has been publishing articles for managers on two-sided platforms since 2006. *See* Thomas Eisenmann, Geoffrey Parker, & Marshall W. Van Alstyne, *Strategies for Two-Sided Markets*, 84 Harv. Bus. Rev. 92 (2006).

ciently above marginal cost so that the platform earns a profit. These access and transaction prices affect the overall use of the platform. How they do so depends on the structure of demand for the participants to join the platform and to use the platform after having joined. It is common, though certainly not universal, for two-sided platforms to lose money on one side of the platform.

Beyond this basic description, two-sided platforms, like traditional enterprises, are diverse. The courts will see many platforms that bear little apparent similarity to the credit-card network at issue in this matter. That is apparent from comparing credit-card networks to newspapers and both to ride-sharing services.

The diversity of platform enterprises, however, is not fundamentally different from the diversity of single-sided enterprises and does not pose any challenge the courts have not successfully met before. This diversity is certainly not a basis for requiring courts to ignore information that may be relevant to a sound assessment of whether challenged conduct is anticompetitive or not.

II. Old And Recent Cases Show Why The Court Should Eschew A Rigid Approach, Which Can Result In False Negatives And False Positives

The Court's decision in *Times-Picayune*, relied on by Petitioners, illustrates how different modes of

analysis can make economic sense in practice, depending on the violation alleged, the specific issue considered, and the facts on the ground.[16]

In analyzing whether this newspaper publisher, a two-sided platform for readers and advertisers, engaged in a Section 1 tying violation by requiring advertisers to place ads in one publication as a condition of placing ads in another publication, the Court could dispose of the issue based on its finding that advertisers had sufficient choices of where to place ads so that the business leverage necessary for an anticompetitive tie was absent.[17] There was no apparent reason to examine the impact of the tie on readers to assess whether there was an antitrust violation involving tying, given the Court's treatment of tying at that time.[18] Moreover, for the purposes of assessing whether the newspaper publisher had the bargaining leverage to impose an anticompetitive tie, it was sufficient to consider only competition for advertising.

In contrast, in analyzing whether the newspaper publisher engaged in predation in violation of Section 2,[19] the District Court examined whether the

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16 *See Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594 (1953).

17 *See id.* at 611-13.

18 One could imagine other sets of facts that would make it necessary to consider both sides for a full understanding of anticompetitive and procompetitive effects in tying cases.

19 Compl. at 6-9, *United States* v. *Times-Picayune Publishing Co.*, 105 F. Supp. 670 (E.D. La. 1952).

platform as a whole—taking both readers and advertisers into account—was operating at a loss.[20] The District Court compared revenue from both sides and the costs on both sides.[21] This two-sided arithmetic helped support the District Court's conclusion that there was no Section 2 violation, a conclusion the Court accepted without criticism.[22] Since newspapers typically lose money on the reader side and make money on the advertising side, it would not have made economic sense, and would have ignored business reality, to look at either side in isolation for the purposes of the analysis of the allegation of predation.

Predatory pricing makes particularly clear how the failure to account for the interdependent demand between the two sides can result in a tribunal concluding that conduct is anticompetitive when it plainly is not (a false positive), and finding that con-

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[20] *United States* v. *Times-Picayune Publishing Co.*, 105 F. Supp. at 677 (evaluating arguments about allocating "revenues and expenses" from both "advertising and circulation" in determining whether one of the defendant's two papers "was operated at a loss").

[21] As a matter of economics this approach is equivalent to comparing the overall price charged by the platform, based on a weighted average across readers and advertisers, and the overall operating costs incurred by the platform, based on a weighted average across readers and advertisers. This approach is consistent with the two-sided price-cost comparison we recommend in our Oxford Handbook paper. *See* Evans & Schmalensee, *supra* note 15, at 423-25.

[22] *See Times-Picayune Publishing Co.* v. *United States*, 345 U.S. at 626-27.

duct is not anticompetitive when it plainly is (a false negative).

A tribunal could reach a false positive conclusion if it found predatory pricing based on the platform charging a below-cost price on one side.[23] That is common profit-maximizing behavior for two-sided platforms even when they operate in competitive industries. A French commercial court made just that mistake in finding that Google Maps engaged in predatory pricing by providing websites with free mapping software.[24] A Paris Appeals Tribunal reversed,[25] relying on an opinion by the French Competition Authority. This opinion, along the same lines as the District Court's in *Times-Picayune*, states that revenue and cost on both sides of the platform should be considered.[26]

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[23] For a survey of issues in analyzing predatory pricing cases for two-sided platforms see Andrea Amelio, Liliane Karlinger, & Tommaso Valletti, *Exclusionary Practices and Two-Sided Platforms*, OECD Directorate for Financial and Enterprise Affairs Competition Committee (2017), https://one.oecd.org/document/DAF/COMP/WD(2017)34/FINAL/en/pdf.

[24] Tribunal De Commerce [TC] [ordinary court of original jurisdiction] Paris, Jan. 31, 2012, Case No. 2009061231.

[25] Cour d'appel [CA] [regional court of appeal] Paris, civ., Nov. 25, 2015, Case No. 12/02931.

[26] Autorité de la Concurrence [French Competition Authority], *Rendu à la Cour D'appel de Paris Concernant un Litige Opposant la société Bottin Cartographes SAS aux sociétés Google Inc. et Google France* [Report to the Paris Court of Appeals Concerning the Litigation between Bottin Cartographes SAS and Google Inc. and Google France] ¶ 50 (Dec. 16, 2014).

A court could also make a false negative finding. Suppose, contrary to the actual facts, that Times-Picayune Publishing had reduced advertising prices for its evening paper without raising prices to readers and that, although the advertising prices were greater than the cost of providing advertising, doing so resulted in operating the evening paper at an overall loss because of losses on the reader side. Assume further that this pricing structure had forced its rival out of business, since it could not match the lower advertising prices without sustaining large losses, and that Times-Picayune Publishing then recouped through higher reader and advertiser prices.

If the District Court had defined an advertising-only market and evaluated the predatory pricing claim based only on whether price was greater than cost in that market it would have, in this hypothetical, concluded that the Times-Picayune Publishing had not engaged in predatory pricing when in fact it had run the newspaper at a loss. The two-sided approach actually adopted by the District Court in 1952 would have saved it from making that false negative determination.

False negatives and false positives can result for any rule of reason analysis in which the finder of fact ignores one side of a platform. There may be situations in which the interdependence between the two sides of a platform is unimportant or can be neglected because of the particular issue at hand. As in any rule of reason inquiry, however, the courts should analyze the challenged conduct in light of business realities and the overall fact pattern before deciding what evidence to consider.

III. When A Platform Provides A Service That Is Jointly And Unseverably Consumed By Two Types Of Customers, There Is A Heightened Risk Of Errors From Analyzing Impact On Only One Type Of Customer

For platforms that provide two groups of customers with a service that they must consume jointly, and where the challenged conduct necessarily affects both types of customers, there is a strong presumption that, as a matter of economics, the rule of reason analysis, at the first stage, should consider the impact of the challenged conduct on both groups of customers.

Joint consumption is not an essential aspect of the services provided by many platforms. People can watch ad-supported television, enjoy the content, and ignore the ads, for instance. Although advertisers hope that enough consumers will pay attention to their ads to justify the cost, content and ads are not necessarily consumed jointly. Providing content and providing ads are severable. It is possible to provide content without ads, and some consumers are willing to pay for programming without ads. As a result, two-sided ad-supported television faces competition from single-sided premium cable channels and streaming video providers.

Some platforms, however, provide a service that by its very nature must be consumed by two customers jointly and cannot be provided separately to one or the other. Consider an equity exchange such as Nasdaq. The service involves helping buyers and

sellers find each other and engage in trades. The service is consumed jointly. The buyer and seller agree to terms and then consummate a transaction. The exchange service is also unseverable since it is not possible to provide it just to buyers or just to sellers. Any enterprise that wants to be in this business must provide the service to both groups.

When a service is provided jointly, a party and a counterparty stand at opposite ends of the service. In some cases, the same platform participants could be on either end of the service depending on their circumstances. People can be both senders and receivers of messages on a messaging platform (e.g. WhatsApp) at different times and be both senders and receivers of funds on a person-to-person money-transfer platform (e.g. Venmo). In other cases, the parties and counterparties are necessarily distinct. Heterosexual dating platforms (e.g. Match.com) connect members of opposite sexes, and payment card networks (e.g. Visa) connect cardholders and merchants.[27]

In all these cases, the platform must decide how to split the cost of the service between the parties

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[27] American Express competes with Visa, MasterCard, and Discover, among others, for transactions between consumers and merchants. Visa and MasterCard operate B2B networks in which credit card issuers (e.g. Chase) sign up and service consumers, and merchant acquirers (e.g. First Data) sign up and service merchants. Visa and MasterCard, however, shape the pricing structure through interchange fees and establish general rules, including ones similar to American Express's, that govern merchants and consumers. *See* Pet. App. 81a-90a.

that consume it jointly and unseverably. OpenTable, for example, charges restaurants $1.00 and diners $0.00 for reservations made through the platform.[28] The price it charges for a reservation would still be $1.00 if it charged restaurants $0.75 and diners $0.25 for each reservation or any other set of numbers that added up to $1.00.

It would not make economic sense to analyze the conduct of a platform that provides a service that is consumed jointly by looking only at what customers on one side pay for the service and receive from it. Businesses of this sort never provide a transaction to only one side of the service, and every interaction has a party and a counterparty that both benefit from the service.

The economic surplus generated by each interaction equals the total difference between the values both parties place on the interaction minus the total costs they incur. The platform determines the division of this surplus between the two sides through the prices it charges each. Competition between platforms that provide joint and unseverable services, like competition between ordinary single-sided businesses, leads to greater economic surplus by encouraging lower prices, better quality, and higher output.

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[28] We have simplified this pricing structure to aid exposition. In fact, OpenTable also charges restaurants a monthly access fee and provides reward points to diners based on how many reservations they make so diners pay a negative transaction fee. *See* David S. Evans & Richard Schmalensee, *Matchmakers: The New Economics of Multisided Platforms* 9-12 (2016).

A platform with market power that provides a service that is consumed jointly and unseverably by consumers could, like any other firm with market power, engage in conduct that would harm competition. Evidence on whether the challenged conduct has made buyers worse off, or would be likely to do so, through some mix of higher prices, lower output, and lower quality would typically be important, or certainly useful, for that assessment. Conduct that, at the market level and taking both sides into account, does not reduce the quality of the service or raise the total cost of the service would ordinarily not reduce total market output or buyers' surplus.[29]

There is a strong presumption that conduct that affects one party to a jointly consumed service has an impact on the other party consuming that service and sharing its cost. In determining prices to maximize its profits, the platform must take the interdependent demands of both parties into account. Conduct that affects one side of the jointly consumed service necessarily affects the other side. Therefore, it would be necessary to consider both sides of the platform that provides the jointly consumed service

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[29] The Petitioners, and some of the *Amici* in support, claim that the total cost of the service to both types of customers is not relevant because competition should determine the relative prices to the two sides. *See* Ohio Br. 18, 42-46; Petitioner *Amici* Law Professors' Br. 4, 20, 23-24; Petitioner *Amici* Economists' Br. 15. It is not possible, however, to determine reliably if conduct has harmed competition and consumers through a distortion in relative market prices without considering both sides of a two-sided platform at the start of the analysis since competition takes place over both sides.

at the first stage of the rule of reason inquiry to determine whether challenged conduct has harmed consumers and the competitive process.[30]

Considering the impact of challenged conduct on both sides of the interaction is very different than the usual evaluation of procompetitive benefits in the second stage of a rule of reason inquiry.

First, it is possible that the conduct harms parties on which a restraint has not been imposed, and failure to consider both sides of the platform involved at the first stage of the rule of reason inquiry could lead to a false negative. A job-matching platform with market power, for example, might require employers to list jobs exclusively with it in exchange for lower prices. If this prevented the entry of other job sites, however, the firm imposing the constraint could charge higher prices to job-seekers. To properly assess whether challenged conduct harms competition, then, the first stage of the rule of reason inquiry should consider the impact of the conduct on both parties, most naturally by considering the impact on total market prices and market output.

Second, it is possible that the conduct benefits parties on one side of the platform. That benefit is part of the economic surplus generated by the interaction between the parties and should be accounted

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[30] In the case before the Court, the Second Circuit correctly decided that the government did not meet its burden in stage one since there was no evidence in the record that the conduct raised the market price of transaction services and, most importantly, reduced the market output of transaction services.

for in determining whether the practice reduces consumer welfare. Consider a money transfer platform that lowered prices to senders so they received a subsidy, and increased prices to receivers by a smaller amount, thereby resulting in a lower total price, higher demand, and greater output. Its pricing could look predatory on the sending side even though this change in pricing structure reduced the total price for money transfers and increased the output of money transfers. In this example, it is not that there are procompetitive benefits that offset anticompetitive effects. There are no possible anticompetitive effects to begin with.

And therein lies the fundamental error in the arguments about impermissible balancing put forward by the Petitioners and *Amici* in support. The first stage of the rule of reason analysis involves determining whether the conduct is anticompetitive. The economic literature on two-sided platforms shows that there is no basis for presuming one could, as a general matter, know the answer to that question without considering both sides of the platform.

IV. Market Definition Should Include Suppliers That Provide Significant Competitive Constraints

Market definition is normally an important step in the analysis of competitive effects. The basic principles for determining the relevant antitrust market are no different for platform enterprises than they are for other enterprises. The relevant antitrust market should consist of the suppliers that compete with the firm or firms of primary interest and impose

significant competitive constraints on that firm or those firms. That principle has been at the core of the economic analysis of market definition since the early 1980s.[31] It is essential that market definition faithfully reflect business realities to identify and assess competitive constraints from suppliers that compete with the firm or firms of primary interest.

A firm that operates a two-sided platform faces competitive pressures that restrain its ability to raise prices or restrict output that generally depend on both sides of the platform.[32] Consider, for example, competing shopping malls. If one mall decided to reduce its subsidy to shoppers—by charging for park-

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[31] The modern approach to market definition, with its emphasis on competitive constraints rather than mere interchangeability, is generally understood to have begun with the development by the U.S. Department of Justice of the 1982 Merger Guidelines. The basic approach in the guidelines is used by economists generally. *See* Gregory J. Werden, *The 1982 Merger Guidelines and the Ascent of the Hypothetical Monopolist Paradigm*, 71 Antitrust L.J. 253 (2003); Dennis W. Carlton, *Market Definition: Use and Abuse*, 3 Competition Pol'y Int'l 3 (2007); Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 Antitrust L.J. 49 (2010); *see also Comcast Corp.* v. *Behrend*, 569 U.S. 27, 44 (2013) (citing the most recent iteration of the Merger Guidelines).

[32] For surveys of the economic literature on market definition for two sided platforms see Lapo Filistrucchi, et al., *Market Definition in Two-Sided Markets: Theory and Practice*, 10 J. Competition L. Econ. 293 (2014) and Arno Rasek & Sebastian Wismer, *Market Definition in Multi-Sided Markets*, OECD Directorate for Financial and Enterprise Affairs Competition Committee (2017), https://one.oecd.org/document/DAF/COMP/WD(2017)33/FINAL/en/pdf.

ing or reducing amenities, for example—some of those shoppers would shift their demand to other malls. Because of that fall in traffic, the demand by retailers for locating at that mall would decline, and therefore the rents the mall could charge would be reduced. Competitive pressures on the retailer side therefore constrain the mall's ability to profitably lower the subsidy to shoppers.

The magnitude of these competitive constraints, however, and the relationship to challenged conduct, will vary across matters before the courts. Sometimes these cross-side competitive constraints could be economically significant, so that it would be a mistake to exclude competition for customers on one side from the set of competitive constraints on competition for the other side. In other cases, these cross-side competitive constraints could be small enough to ignore. In some cases, even though these cross-side competitive constraints are significant, it may be convenient to proceed at the first stage by assembling the competitive constraints separately for each side into two markets and then to consider the linkages between them.[33] In all cases, it is important at the first stage of the rule of reason analysis to respect the reality that two-sided platforms are in the business of linking their two sides.

The Justice Department, and the Petitioner *Amici* Law Professors and Petitioner *Amici* Economists, are asking the Court to *require*, as a matter of law,

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[33] For a discussion of considering linked markets versus a single market see Rasek & Wismer, *supra* note 32, at §§ 2.1-2.2.

that the relevant market for assessing challenged conduct by *all* platform enterprises *never include* competition for the customers on the other side of the platform. This rigid approach would exclude relevant competitive constraints on the conduct at issue and is therefore inconsistent with modern approaches to market definition. It would also prevent the courts from accounting for the business reality of platform enterprises when it is important to do so.

The fundamental error in imposing this novel limitation on the court is most clearly seen for platforms that provide services that are consumed jointly and unseverably. In that case participants are consuming the same service, just standing at different ends. Any enterprise that provides the service would have to compete for both types of customers. The value of the service to one type of customer depends on their ability to interact with the other type of customer. A platform that is more successful at attracting one type of customer necessarily makes it harder for its rivals to attract the other type of customer. Defining a market that included just one type of customer would be inconsistent with business reality, as there is no rational competition for one side without the other, and it would ignore the competitive constraints coming from competition for both groups.

The Petitioners, and the *Amici* in support, base their proposal for confining market definition for platform enterprises on two false premises.

The first false premise is that the purpose of market definition is to identify, mechanically, products that are interchangeable. Examining the extent to which consumers can substitute the products of different suppliers is often an important element in

identifying those suppliers that should be included in the market because they impose significant competitive constraints. However, the analysis of the interchangeability of products is not an end in itself.[34] It is just a means for helping the court identify relevant competitive constraints.[35]

The second false premise is that the interchangeability between the services received by opposing sides of a platform is somehow relevant for assessing competitive constraints. To see the error in their analysis, consider competition among person-to-person money transfer services. It is true that the service provided to a person who sends money is literally different from, and not interchangeable with,

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[34] *See* Werden, *supra* note 31, at 253; Frank H. Easterbrook, *Limits of Antitrust*, 63 Tex. L. Rev. 1, 22 (1984) ("Market definition is just a tool in the investigation of market power . . . .").

[35] It is not uncommon for courts and antitrust authorities to define relevant product markets that include products or services that most customers would not consider to be reasonable substitutes. For example, the market for hospital services may include heart transplants, brain tumor surgery, and appendectomies, which patients and doctors would not consider to be interchangeable. *See, e.g.*, *FTC* v. *Penn State Hershey Medical Center*, 838 F.3d 327, 338-45 (3d Cir. 2016) (including local hospitals that constrain the defendants' pricing of general acute care services and incorporating new economic learning for determining relevant geographic markets); *FTC* v. *Advocate Health Care Network*, 841 F.3d 460, 468, 471-73 (7th Cir. 2016) (including "abdominal surgeries, childbirth, treatment of serious infections, and some emergency care" in the relevant product market and adopting new economic learning for relevant market definition).

the service provided to a person who receives money. Defining separate markets for sending money and receiving money, however, would ignore the core business reality that suppliers compete for transactions between senders and receivers. The transactions between senders and receivers are substitutable across platforms. An increase in the price of the transaction by one platform—almost no matter how that price is divided between the sender and receiver sides—would tend to result in an increase in demand for other platforms.

In the cases of platforms that provide a service that is consumed jointly and unseverably, the observation that the customers are at different ends of the service is irrelevant and should not be used to excise important competitive constraints from the relevant market. Platforms that provide similar jointly consumed services are substitutes for each other, and their products are interchangeable as a matter of business reality. Market definition for platforms that provide services that are jointly consumed and unseverable should therefore focus on identifying suppliers that provide services that are interchangeable in this sense, which typically accords with business reality.

The Second Circuit applied these principles soundly in its decision in *American Express*. The District Court found that American Express provides transaction services jointly, and simultaneously, to cardholders and merchants in competition with other payment card networks that provide similar ser-

vices.[36] The relevant antitrust market should thus consist of those competing suppliers whose services are interchangeable.[37] To assess whether the conduct at issue in the case was anticompetitive at the first stage of the rule of reason analysis it is necessary to consider both parties to those transactions.[38] The Second Circuit found that the Plaintiffs had not met their burden because there was no evidence that the price of those transactions increased and, most importantly, there was no evidence that the conduct had reduced the market output of transaction services.[39]

CONCLUSION

The history of the application of the rule of reason shows the importance of allowing the courts to consider all economic evidence, including new economic learning, that is potentially relevant for determining whether conduct is anticompetitive or not.[40] There is

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[36] *See* Pet. App. 77a-81a.

[37] *See id.* at 32a-35a.

[38] *See id.* at 52a.

[39] *Id.* at 52a-53a (noting that the evidence at trial indicated both the quantity of transactions and the quality of card services increased and that Plaintiffs introduced no evidence indicating that prices for transactions increased).

[40] *See, e.g., Leegin Creative Leather Products, Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 889-91, 897-99 (2007) (citing new economic learning as a justification for ending the per se illegality of vertical resale price maintenance agreements and guiding courts to take into account economic considerations when applying the rule of reason).

certainly no basis in economics for putting special blinders on the courts when it comes to considering platform enterprises, as requested by the Petitioners and some of their *Amici*. Doing so would be a radical departure from the approach that the Court has taken, with great success, in applying the rule of reason to a wide variety of businesses and a wide variety of conduct and fact patterns.

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For the foregoing reasons, the rigid analytical framework recommended by the Petitioners and some of their *Amici* should be rejected and, particularly given the lack of evidence that the challenged conduct reduced the output of transaction services, the decision of the Second Circuit should be affirmed.

Respectfully submitted,

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